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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 684

AMANA REFRIGERATION, INC.,
Petitioner,

—against—

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

AMANA REFRIGERATION, INC., *Petitioner* *against* COLUMBIA BROADCASTING SYSTEM, INC., *Respondent*	No. 684

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a contractual arrangement under which CBS performed the services necessary to produce and broadcast a television program, "The Price Saver Show," under Amana's sponsorship, involved "any purchase or commodities" within the meaning of Section 2(a) of the Clayton Act (15 U. S. C. § 13) or "any sale or lease of goods, wares, merchandise, machinery, supplies, or other commodities" within the meaning of Section 3 of the Clayton Act (15 U. S. C. § 14).

STATEMENT OF THE CASE

Respondent (CBS) brought this action to recover $284,545.21 from petitioner (Amana) for services rendered by CBS in connection with producing and broadcasting "The

Phil Silvers Show under Ansana's sponsorship over the CBS Television Network. CBS services were rendered pursuant to two agreements: a Program Agreement (R. App. 7-8*) covering production of the program, and a Facilities Agreement (R. App. 21-30) providing for its broadcasting.**

Ansana answered, admitting liability for all except $33,111.27 of the amount claimed, and filed a three-count counterclaim for trebled damages of $[illegible] arising out of CBS' alleged violation of the antitrust laws in connection with the production and broadcast of The Phil Silvers Show. The First Count alleged that CBS had violated Section 2(a) of the Clayton Act by granting certain unspecified advertisers sponsoring multi-network programs greater discounts from CBS' charges than it had granted Ansana. The Second and Third Counts alleged violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act, the Second Count claiming that, as a condition of sponsorship, Ansana had illegally been required to sponsor the broadcast over a specified group of stations.

* App. refers to respondent's appendix in the court below, a volume of which was filed with the petition. Similarly, "P App." refers to the appendix filed to petitioner's brief in opposition, a volume of which was also filed with the petition. The petitioner is referred to as "Pet."

** Under the Program Agreement, CBS provided "at the sole cost of the producer staff, talent and music, the use of cameras, studios, scenery and other production facilities and all the miscellaneous other services, personnel and equipment necessary for the production of such program."

[illegible] central broadcasting facilities and operating personnel for the operation of the broadcast, [illegible] arrange for the cable and microwave relays which connect these facilities with affiliated stations, [illegible] arrange for the local telecast of the program with the 135 stations selected by Ansana, and [illegible] to provide a host of related services including public relations, centralized billing, procurement of performing rights in musical material, delayed time broadcasts in special areas, etc.

comprising the basic CBS network, and the Third Count charging that CBS refused Amana the opportunity of broadcast sponsorship unless Amana sponsored The Phil Silvers Show, in which CBS allegedly had a financial interest, in lieu of an unnamed program in which CBS had no such interest.

On CBS' motion the First Count was dismissed on the ground that no "purchase" of "commodities" was involved. Amana's appeal from that order was dismissed by the Court of Appeals as not appealable. 274 F. 2d 257, 1959). Amana sought certiorari claiming, *inter alia*, that this Court should decide whether the broadcasting services rendered were "commodities" within the meaning of Section 2(a) of the Clayton Act. Certiorari was denied. 362 U.S. 928 (1960), No. 710, October Term, 1959.

Amana then amended its counterclaim and having, subsequently, abandoned its Sherman Act claims by formal release (P. App. 1-2) deleted those claims from the second and third counts. Thus, Amana relied exclusively on Sections 2(a) and 3 of the Clayton Act. (P. App. 12-15). CBS submitted a verified and documented reply contravening the factual allegations of the counterclaim (R. App. 1-43). CBS also moved to dismiss all three counts of the counterclaim on the grounds that the transactions involved purchases of "commodities of like grade and quality" within the meaning of Section 2(a) of the Clayton Act, no business of selling, leasing, and handling motion pictures, samples, or advertising [illegible] within the meaning of Section 3 and [illegible] (P. App. 12-14). The District Court dismissed all three counts of Amana's counterclaim and entered judgment for CBS on its complaint. The judgment still unpaid, $32,114.57 (P. App. 14-15).

Amana appealed the dismissal of its counterclaim (P. App. 16). The Court of Appeals affirmed. 295 F. 2d

375, concluding that what Amana received under the contractual arrangement was simply "the contractual right or privilege of sponsorship identification with the broadcast of a television program and the use of a portion of the broadcast time for product advertising". (Pet. A-5). It held that such right or privilege was not a commodity within the meaning or intent of either Section 2(a) or Section 3. Dismissal of the Third Count was also affirmed for the further reason that it fell "within the purview of *United States* v. *Jerrold Electronics Corporation*, E. D. Pa. 1960, 187 F. Supp. 545, aff. 365 U. S. 567 and is insufficient for the additional reason that 15 U. S. C. A. § 14 does not apply to tie-ins involving services." (Pet. A-6).

ARGUMENT

Petitioner asserts only one reason for certiorari—that the so-called "commodity issue" is an important question which needs "clarification" by this Court (Pet. 6-7). This petitioner unsuccessfully urged that same reason when the case was before this Court two years ago.* It should be rejected again. There is no conflict of decisions and petitioner asserts none. The holdings below are consistent with, and indeed compelled by, the language of Sections 2(a) and 3 of the Clayton Act, their legislative history and interpretation, and their long-standing construction by the courts, the enforcement agencies and the commentators. Accordingly,

*In its previous petition for certiorari, No. 710, O. T. 1959, Amana devoted half of its "Reasons for Granting the Writ" to the argument:

> "The Writ Should be Granted Because the Question of Whether Television Time Is a 'Commodity' for Purposes of the Clayton and Robinson-Patman Acts Is an Important Question under the Federal Antitrust Laws That Should Be Decided by This Court."

Certiorari was nevertheless denied, 362 U. S. 928 (1960).

the issue petitioner tenders is both well settled and without public importance and does not warrant consideration by this Court. Instead of presenting an unresolved question of public importance, the petition simply reveals a private litigant seeking review of a particular matter which was correctly decided against it.

The agreements which are the foundation of Amana's counterclaim obligated CBS to produce and broadcast The Phil Silvers Show under Amana's sponsorship so that Amana could advertise its products. The transaction was comparable to that in which any advertising medium provides its services for disseminating an advertiser's message to the public. No matter what semantic characterization is given to such a transaction, it is clear that it does not involve any "commodities" within the meaning or intent of Sections 2(a) and 3 of the Clayton Act.

Whether called television time, sponsorship identification, or services, what CBS provided for Amana was only services and intangibles which are not "commodities" within the ordinary meaning of the language of Sections 2(a) and (3), as the Court below held.* Amana concedes as much and is

*This is so because it appears from the statutory language and its context that the term "commodities", as used in Sections 2(a) and 3 [illegible] intangibles. A contrary construction makes semantic nonsense of the statute, as pointed out in [illegible] Sales of Commodities in Commerce Including Certain Under the Robinson-Patman Act 67 Yale L. J. 1155, 11[illegible] (1958). This is also confirmed by the fact that [illegible] it said "commodities" and "[illegible]" in Section 2 [illegible] makes it unlawful to discriminate [illegible] "in contracting to furnish [illegible] determined [illegible] for all purchasers" [illegible]

Reading the [illegible] and CBS [illegible] involve any "commodity" within the statutory context, Amana [illegible] that by legal [illegible] 10th Cir. 1957. [illegible]

accordingly forced to argue that those Sections should nevertheless be construed to apply because of their "clear remedial purpose". (Pet. 7-10). But it is the function of the courts "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry.*, 343 U. S. 562, 575 (1952), and this Court has recently rejected an identical appeal to "remedial purpose" in a closely analogous situation. *Blau v. Lehman*, 368 U. S. 403 (1962).

Moreover, the statute's inapplicability to this transaction, which appears from its terms and phraseology, is confirmed by the legislative history and interpretation of the statute. The bill which became the Clayton Act was explained in the accompanying report submitted by Congressman Clayton as applying to "goods, wares and merchandise", to "manufacturers" and "dealers", etc.—terms wholly inconsistent with any intent to reach transactions involving only services or intangibles such as the "privilege of sponsorship identification". See H. R. Rep. No. 627 at 8, 11, 63d Cong., 2d Sess. (1914). See also S. Rep. No. 698, 63d Cong., 2d Sess. (1914). The same expressions of intent pervaded the enactment in 1936 of the Robinson-Patman amendment to Section 2. The amendment's scope was repeatedly explained in terms of "merchandise distribution", "goods", "manufacturers, wholesalers and retailers". See, *e.g.*, Congressman Patman's statements at 79 Cong. Rec.

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approach and characterized the situation as a purchase by Ammana of the privilege of having its name identified as sponsor of the program broadcast and making use of the promotable portion thereof for advertising its products and services. The sponsorship rights or privilege of sponsorship identification with the broadcast of a television program and the use of a promotable portion of it are for product advertising." (Pet. App. 15a). The agreement terms were as set forth in CBS' reply (R. App. 7-8, 21-23), all merely for the services of producing and broadcasting the Polly Bergen show under Ammana's sponsorship for the purpose of advertising its products.

9078-79 (1935); 80 Cong. Rec. 7885-87, 8111 (1936). Moreover, it was authoritatively explained by Congressman Patman that the amendment did not apply to services generally and to advertising in particular. PATMAN, THE ROBINSON-PATMAN ACT (1938):

> "Question. Does the Robinson-Patman Act apply to sale of magazines or other advertising space?
>
> "Opinion. No. The act applies only to commodities sold for use, consumption, or resale in commerce. (p. 75)
>
> * * *
>
> "Question. Does the Act cover and include the sale of services?
>
> "Opinion. The Act applies only to *commodities* sold for use, consumption, or resale in commerce. * * * But in the sense that your question is intended, the Act does not apply to service business. (p. 98)"*.

It was likewise expressly stated in the Senate that Section 2(a) of the amendment was not intended to apply to the services provided by advertising media.**

* These substantially contemporaneous and authoritative statements of Congressman Patman are authoritative guides to the meaning of the Act he co-authored. See [illegible] 355 U.S. 373 at 382 (1958), in which the Court gave substantial weight to statements made by Representative Patman in the passage of the Act before this expressed the legislative intent.

** Senator Logan, on [illegible] stated that the chairman of the subcommittee [illegible] the following colloquy (80 Cong. Rec. 8115 (1936)):

> "Mr. Logan. I should like to ask the senator from [illegible] what application the provision also makes [illegible] have to newspapers, shall we say, [illegible] or agencies. Would it be [illegible] part respecting advertisers based on the amount of advertising carried?
>
> "Mr. Logan. No. I may say to the senator from Oklahoma that the only thing the bill attempts to do [illegible]

Nor has Congress' understanding of the scope of Sections 2(a) and 3 changed. As recently as 1957, it unequivocally indicated that services—particularly those involved in television network broadcasting—were not commodities subject to Sections 2(a) and 3. After extensive hearings on the television broadcasting industry, the Antitrust Subcommittee of the House Judiciary Committee concluded that the very practice which petitioner challenges here was beyond the reach of Sections 2(a) and 3 because only services were involved, and each of those Sections "covers only tangible commodities and not services." H. R. Rep. No. 607, 85th Cong., 1st Sess., pp. 61-68, esp. pp. 66-67 (1957).* The Subcommittee stated that it would consider a possible amendment to make Sections 2 and 3 applicable to services as well as commodities. Id. p. 67. For that purpose, Chairman Celler introduced H. R. 8277, 85th Cong., 1st Sess. (1957), which would have expanded the term "commodities" in, and hence, the scope of, Sections 2 and 3 to include "services". However, that proposal failed of adoption, even in committee.

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advertising is to provide [in Section 2(d)] that the allowance made for advertising purposes shall be used for the benefit of the seller, and for the benefit of the buyer no further than he is benefited by advertising the particular line of goods. The evil sought to be remedied is that these large advertising allowances are forced

* * *

"Mr. GORE. Then, if a newspaper charged $10 an inch for 10 inches, it would not be required to charge $10 an inch for 100 inches?

"Mr. LOGAN. No; the bill does not require anything of that kind."

Senator Robinson, the co-author, adopted Senator Logan's explanation. 80 Cong. Rec. 3119 (1936).

*The Subcommittee's conclusion was reiterated by its Chairman Celler, *Antitrust Problems in The Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB., 549, 569-70 (1957).

In accordance with the statutory language and legislative history, the consistent judicial construction has been that Sections 2(a) and 3 do not apply to services or other intangibles. See *e.g., Electray, Inc. v. Public Serv. Interstate Transp. Co.*, 72 F. 2d 761 (3d Cir. 1934); *cert. denied*, 293 U. S. 626 (1935); *General Shale Products Corp. v. Struck Const. Co.*, 132 F. 2d 425 (10th Cir. 1942), *cert. denied*, 318 U. S. 780 (1943); *United States v. Investors Diversified Servs., Inc.*, 102 F. Supp. 645 (D. Minn. 1951); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd* 365 U. S. 567 (1961).*

In addition to this settled course of decisional law, the administrative construction of Sections 2(a) and 3 also compels the conclusion that the instant transaction does not involve any "commodity". The Federal Trade Commission long ago decided that advertising space is not a "commodity" within the meaning of Section 2(a). See 81 Cong. Rec. App. 2336-2337 (1937).** The Department of Justice referred to that opinion in explaining its decision to proceed under the Sherman Act, instead of the Clayton Act, in the *Times Picayune* case—see 345 U. S. 594, 600 n. 27 (1953). And only recently the Department of Justice conceded in the *Jerrold Electronics* case that Section 3 did not apply to defendant's refusal to sell television equipment unless the buyer entered into a service contract, "because that section, by its terms, only concerns 'goods, wares, merchandise,

*See also *Auto Acceptance Loan Co. v. Prestige Loan Co.*, 276 Fed. 537 (10th Cir. 1921), *cert. denied*, 258 U. S. 622 (1922); *United States v. Detroit Street Railway Company*, [illegible] F. Supp. 81, 87 (E. D. Mich. 1953); *Cf. Scott Publishing Co. v. Columbia Pass. Publication Co.*, 180 F. Supp. 754, 770 (W. D. Wash. 1959), *aff'd*, 293 F. 2d 15, 20 (9th Cir.), *cert. denied*, 368 U. S. 930 (1961); *Northwestern Food Mfg. Co.*, [illegible] F. Supp. 735, 742 [illegible] (W. D. S. C. 1958), *aff'd*, 262 F. 2d 556 (4th Cir. 1959).

**A compendium of cases prepared by the Federal Trade Commission at Congressman Patman's request and published in the Congressional Record.

machinery, supplies, or other commodities." (15 U. S. C. A. § 14). It does not apply to tie-ins involving services." 187 F. Supp. 545, 554 (1960).

The view of the agencies charged with enforcement of Sections 2(a) and 3—that those sections do not reach transactions of the sort here involved—is most eloquently expressed by the absence of any proceedings against the television industry by either the Federal Trade Commission or the Department of Justice for violation of those sections. Just "as established practice may shed light on the extent of power conveyed by general statutory language so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U. S. 349, 352 (1941).

The commentators, too, hold the same view that television broadcasting transactions of the sort presented here are beyond the ambit of Sections 2(a) and 3. Ulrich, Dixon, THE MODERN LAW OF ADVERTISING AND MARKETING, p. 18 (1948) states:

> "The insertion of an advertisement in a publication or its announcement over the airwaves does not involve the purchase or sale of commodities. . . ."

Congressman Celler concurred in that view. Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549, 569-70 (1957).* See also Rowe, *Discriminatory Sales of Commodities in Commerce, Jurisdictional Criteria Under the Robinson-Patman Act*,

* Congressman Celler's view [illegible] the Antitrust Subcommittee [illegible] in the hearings and debates [illegible] Robinson-Patman amendment and was [illegible] of its intended scope.

67 YALE L. J. 1155, 1163-65 (1958); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 51 (1958); Handler, *Recent Antitrust Developments*, 13 RECORD OF N. Y. C. B. A. 417 (1958), and ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS, p. 78 (1937).

In short, those concerned with the meaning and intent of Sections 2(a) and 3 of the Clayton Act, especially Congress and the enforcement agencies, unanimously support the decision below that intangibles and services, such as those here involved, are not "commodities" under either of those sections. That decision is accordingly correct. For the same reason the so-called "commodity issue" lacks public importance, particularly since it is presented by a litigant who, having released any claims which it might have had under the Sherman Act, now seeks to further its private interests by urging an unwarranted distortion of the Clayton Act, contrary to the settled understanding of its scope and the industry practice which has grown up in

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*Wholly apart from the [illegible] the [illegible] Amana's contention [illegible] are on that the transaction [illegible] of any commodity, as [illegible] under Sections 2(a) and 3 [illegible] *Federal Trade Commission* [illegible] 1924 *Students Book* [illegible] 232 [illegible] 21 [illegible] *Thomas Cusack Co. v. Chicago* [illegible] 242 F. Supp. 502 [illegible] 102 F. Supp. [illegible] The Commission [illegible] "tying" under Section 3 [illegible] the Clayton [illegible] Agreement, which [illegible] 187 F. Supp. 545 [illegible] *Fed. Trade Comm. v. Ind.* [illegible]

the light of that understanding.* This case, therefore, does not present any question warranting any further review. Certainly, it furnishes no occasion for the "final determination of the statute's scope" with its "far-reaching consequences" which Amana purports to seek "for the entire publications industry" and for the guidance of the Federal courts. (Pet. 6, 12-14). As we said two years ago, in opposing this same argument by Amana, it will be time enough for this Court to consider the matter if a conflict should develop. See Brief for the Respondent in Opposition, No. 710, O. T. 1959, p. 18.

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*The consistent and long-standing views of Congress, the courts, enforcement agencies and commentators that Sections 2(a) and 3 are not applicable to transactions of the kind here involved have, of course, been followed in the practices of the advertising media. See, *e.g.*, EDWARDS AND BROWN, RETAIL ADVERTISING AND SALES PROMOTION, p. 439 (1959); FREY, ADVERTISING, pp. 434-436, 482 (1947); HALL, THEORY AND PRACTICE OF ADVERTISING, p. 597 (1926); R. App. 45-93. This Court has repeatedly emphasized the significance of such considerations and has accordingly held that Congress, which acts prospectively, "is the proper agency to change an interpretation of [an] Act unbroken since its passage, if the change is to be made." *Blau v. Lehman*, 368 U. S. 403 (1962), and see, *e.g.*, *Brotherhood of Maintenance of Way Employes v. United States*, 366 U. S. 169, 179 (1961); *Toolson v. New York Yankees, Inc.*, 346 U. S. 356, 357 (1953); *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, 478 (1952); *Helvering v. Griffiths*, 318 U. S. 371, 403 (1943); *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U. S. 349, 352 (1941); *United States v. State Bank of North Carolina*, 6 Pet. 29, 39-40 (1832). The inapplicability of Sections 2(a) and 3 of the Clayton Act to the transaction in this case, of course, does not mean that the practices of advertising media are necessarily immune from scrutiny under the antitrust laws. There are the proscriptions of the Sherman Act, but that Act is not involved here since Amana voluntarily released any claims it might have had thereunder.

CONCLUSION

For the reasons stated, the petition should be denied.

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